FILED

No. 09-718

DEC 14 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

LAWRENCE MATTISON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Lawrence Mattison
2010 N. Mallory Street, #B
Hampton, Virginia 23664
(757) 604-7894
lawrence.mattison@va.gov

Petitioner pro se

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

The Virginia Supreme Court, in agreement with the Virginia Court of Appeal's analysis of race based selective prosecution seems to suggests that motive in a race-based claim must be proven by something other than the separation of similarly situated persons by race. The Appellate Court's analysis suggests that motive was not met. Both Virginia Appellate Courts ignored a vague standard of immunity, and the actions of Jessica who benifited from that immunity by admitted to assaulting Petitioner.

My questions are:

1. When a State is confronted with a claim of race-based selective prosecution does the standard of proof for motive need to be something other than the separation of similarly situated persons by race?

2. When a State is confronted with a claim of race-based selective prosecution must a claimant show similarly situated persons from a multiple of cases **or** can a claimant show similarly situated persons as multiple defendants involved in the same case?

Question cont.....

3. Is the State of Virginia in violation of the 14th Amendment's due process/equal protection clause by applying a different standard to one person of a particular race and gender where another is of a different race and gender and both were similarly situated?

4. Is the State of Virginia in violation of petitioner's equal protection/due process rights by ignoring the actions and explanations of both similarly situated persons in this case as defined within the 14th Amendment?

5. Did Petitioner show motive as required by the 14th Amendment in his claim of race-based selective prosecution?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i, ii

TABLE OF AUTHORITIES v

OPINIONS BELOW..... 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 9

I. The Virginia Supreme Court, in agreement w/ the Va. Court of Appeals contradicts this court's proof of the elements in a race- base selective prosecution claim 10

A. This Court's Precedents Require that a claimant show that similarly situated persons of a different race were not prosecuted but should have been..... 13

B. Petitioner maintains that motive of a 14th Amendment violation was shown in this cases 15

CONCLUSION 19

APPENDIX ....A1 – A13

Va. Court of Appeals 4pg opinion..... A-1

Va. Sup Ct. denial of Petition A-10

Va. Sup Ct. denial of Rehearing..... A-12

TABLE OF AUTHORITIES

Hayes v. Oakwood health care, inc, 729 N.W 2d 488 (2007) 10, 12

Table of Authorities cont.....

Lawrence Mattison v. Commonwealth of Virginia
U.S. Sup Ct No. 05-626(2005) 16
Va. Sup ct. No. 042417(2005) 16
Va. ct of Appeals 3045-03-1(2004) 16

Oyler v. Boles,
368 U.S. 488, 456 (1962) 3

State v. A.R.S.,
684 SO. 2d 1383 (1996) 9, 11

U.S. v. Armstrong,
116 S. Ct. 1480, 1486,
134 L. Ed 2d 687 (1996) 9, 11, 14

Constitutional Provisions

Fourteenth Amendment,
U.S. Const. amend. XIV, § 1 2

Statutes and rules

Va. Code §19.2-263.3 ..... 2, 12

Va. Code §18.2-51 4

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM _____

Lawrence Mattison,

Petitioner

v.

Commonwealth of Virginia,

Respondent

PETITION FOR WRIT OF CERTIORARI

Lawrence Mattiosn, pro se, petitions for a writ of Certiorari to review the decision of the Virginia Supreme Court

OPINIONS BELOW

The judgments of the Va. Court of Appeals and the order of the Supreme Court of Virginia appear in the attached appendix. **(Appendix A-1 to A-13)**

JURISDICTION

This Petition to the Supreme Court of the United States will be timely if filed NLT Dec 24, 2009.

The decision of the Virginia Supreme Court affirming the decision of the Virginia Court of Appeals was issued on September 24, 2009. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 and Rule 10 of the Rules of the U.S. Supreme Court.

CONTITUTIONAL PROVISIONS, STATUES, RULES AND REGULATIONS INVLOVED

1. Fourteenth Amendment to the United States Constitution, incorporated against the states through the Due Process/ Equal Protection Clause Provides in pertinent part:

   (a) The equal protection clause of the XIV Amendment provides that no State shall deny to any person the equal protection of the laws, this essentially a direction that all persons similarly situated be treated alike.

(b) The due Process which in part directs the prosecutorial discretionary act of deciding who to prosecute.

2. Virginia code § 19.2-263.3 states in relevant part..."Nolle prosecqui shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefore shown."

3. Prosecutorial vindictiveness. The decision by the state to prosecute individuals for certain crimes may not be based on "an unjustifiable standard such as race, religion or other arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456 (1962).

STATEMENT OF THE CASE

This case concerns the State of Virginia ignoring a race-based selective prosecution claim. The motive of the prosecutor was to single out Petitioner for felony prosecution, in violation of his XIV Amendment right to equal protection when there was another similarly situated person of a different race and gender involved. In a three person melee, Petitioner a black male, defendant Jason dean, a white male, and defendant Jessica Dougherty, a white female, were charged with the same felony offense.

The motive of the prosecutor was to move the two white defendants from felony culpability for assaulting petitioner and prosecute petitioner for felony assault against the white male defendant. One tactic was to offer all three a nolle prosequi at the States lowest Court in inconsistent with State Statue. The next tactic used was the application of an unjustifiable, unconstitutional immunity deal not grounded in law or fact given to defendant Jessica. Both Petitioner and Jessica are persons of a different race and gender and similarly situated.

1. **Virginia Code §18.2-51** provides: Anyone who did Unlawfully, feloniously and maliciously cause bodily injury to another with the intent to maim, disfigure, disable, or kill shall be guilty of a felony. This felony has within it's structure a lesser-included misdemeanor charge of assault and battery (Va. code § 18.2-57). A person can be charged with the felony but the evidence could justify the lesser-included.

When three persons are charged by warrant with the same felony then arrested and all choose to give mirandized statements to police investigators, a

prosecutor cannot base their decision to prosecute based on race and gender. Whatever the rational for prosecution of one defendant should have been weighted against the other defendant; likewise, whatever the reason for immunity of one defendant should have been weighted against the other defendant. The Virginia Court system allowed bias, based on race and gender in affirming this case inconsistent with the XIV Amendment, this case is clearly selective prosecution.

2. Lawrence Mattison, pro se on this Petition submits the following relevant facts which are not in dispute:

Although it is a fact that two weapons were used and two people were injured with each weapon, the mirandized statements and trial court testimony which give rise to the unlawful use of each weapon is where the State of Virginia contradicts this Court and the U.S. Constitution by arbitrarily allowing a nolle prosequi and subsequent immunity deal of one defendant similarly situated with another defendant of a different race and gender.

The facts are as follows:[1]

On the evening of February 24, 2007 a fight ensued in Lawrence's home on N. Mallory St. in Hampton, Va. where Jason Dean and Jessica Dougherty were drinking a heavy amount of alcohol. **Jason T29; Jessica T63, T75, T95**. Jason came to Lawrence's room to "confront him" about words Lawrence said to Kathy Antinori (Jessica's mother and Lawrence's girlfriend, now Lawrence's wife) about Jessica but NOT within hearing range of *Jessica or Jason*, ***Jason* T14; *Jessica* T50, T82, T84, T86; Lawrence T116, T121, T122.** A fight started where Jason was eventually "pinned" to a chair, **Jason T15; Lawrence T117,** where during the fight Lawrence never hit Jason, **Jason T33; Lawrence T124**. Jessica broke up the fight, **Jason T56; Lawrence T117**. At the end of the first fight

---

[1] References to the transcript in this petition are to the transcript of trial on Jan 3, 2008 and indicated by 'T____' for transcript page No. Only coorborating transcript-statements were used on petition.

Lawrence went into his bedroom then came out, **Jason T19; Jessica T65, T67, T68, T91; Lawrence T117**, words were exchanged and a 2nd fight started at the back door to the home, **Jessica T67, T68, T91; Lawrence T117, T118**. At that point Jessica came at Lawrence and stabbed him with a steak knife, **Jessica T68, T93, T94; Lawrence T118.** The second fight ended by Lawrence "getting up" and leaving the house, **Jason T22; Jessica T70; Lawrence T118.**[2]

Statements under Miranda and trial court testimony revealed Jessica having no knowledge of any other weapon except hers, that Lawrence was just standing there when she stabbed him and she did not know who started the second fight, even though she was right there in the middle of the two males, **Jessica T93-95**. Her mirandized statement mentioned Jason as starting the fight. Other than this inconsistency, Jessica's testimony at trial was consistent with her mirandized statement.

---

[2] Transcript testimony was provided to the Virginia Supreme Court within the court record for this trial Lawrence Mattison v. Commonwealth # 082391

Lawrence's statement under Miranda stated he used a weapon because he was under attack from Jason after repeated attempts to stop Jason's aggressive acts toward him, that he was injured in the 1st attack and feared further bodily harm, **Lawrence T117, T125-126, T134-135.** Lawrence's statement was read into evidence at trial.

Lawrence timely filed a Petition for Appeal pro se to the Virginia Intermediate Appellate Court and was denied by 4-page opinion (see appendix A-8,9). The opinion stated in relevant part that Petitioner had not met his burden for motive in a race-based selective prosecution claim. **App A-8, A9**

That Court also ignored Jessica's testimony, in reference to similarly situated persons, summarized in the Petition w/ transcripts of trial. Lawrence timely filed a petition for appeal to the Va. Supreme Court which was denied by 1pg letter on June 24, 2009. **App A-10, A-11** A petition for Rehearing was denied September 24, 2009. **App A-12, A-13.**

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for four reasons:

First, the Virginia Supreme Court's decision affirming the intermediate Appellate Court directly conflicts with this Court's decision on weather the elements for a race-based selective prosecution claim should be within the same case **or** multiple cases. **This Court**, in U. S. v. Armstrong, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996). decided that evidence proving race-based selective prosecution was not met when 5 black defendants could not show similarly situated persons of other races who were not prosecuted.

This Court summed up the claim as saying "Statistical evidence was not enough" The question remains on what standard the State of Virginia used to determine elements in race-based cases.

In Florida, State v. A.R.S.,684 So. 2d 1383 (1996). The issue involved one case with multiple person of different gender. Claimant, a male, raised a selective

prosecution claim, he was prosecuted for various sexual crimes but not the female. His evidence was specific to his case, charges associated with the claim were dismissed in favor of the claimant, the state appealed and the decision was reversed in favor of the State. The State in this case reviewed the claim and responded to the claim. This State did sight precedent with reasons specific to the A.R.S. case.

In Michigan, Haynes v. Oakwood Healthcare, inc.(and others),729 N.W. 2d 488 (2007). Issue involved one case with multiple persons of different race. Claimant, a black male, files selective prosecution claim against employer, he claimed being treated differently than others similarly situated on the job. His case was given specific responses to this specific claim.

In Virginia in this case there is, not only a case sufficient on first look but, a case specific in violations, which is why certiorari is requested.

Virginia ignored the similarly situated claim and Jessica's transcript testimony.[3]

Second, The Virginia Supreme Court in agreement w/ the Va. intermediate appellate court depends their conflict with this Court concerning how to determine similarly situated persons in a claim of race-based selective prosecution. Virginia's response did not address the similarly situated race-based claim. Their statement was simply "motive was not met".**App A-8, A-9** The fact that Jessica and Jason are white, the nolle prosequi without reason, the "immunity deal" between Jessica's Attorney and the prosecutor, the prosecutorial vindictiveness claim, and the possibility that a not-so-honest case was given to a grand jury (all due process violations) all clearly blatant selective prosecution violations.
As in each case [State v. A.R.S.,684 So. 2d 1383 (1996); U. S. v. Armstrong, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996) and

---

[3] The Virginia Appellate Courts have granted appeals and given analysis to race-based **jury selection** cases.

Haynes v. Oakwood Healthcare, inc, and others),729 N.W. 2d 488 (2007)] all recite specific similarities and differences when confronted with similarly-situated persons in a race-based claim.

Third Virginia's Appellate Courts are inconsistent with this court in reference to motive in a race-based selective prosecution cases.

Again, in Virginia cases of race-based jury selection are give credibility for analysis. Motive, in this case was shown based on the tactics from the outset..... separation of persons by race for prosecution. This case started in the lowest court in Virginia (General District Court). One way Virginia allows a case to move from low court to the court of record (Circuit Court) involves the use of the district court through preliminary hearing. Once the low court's jurisdiction is invoked prosecutors have ways to deal with a case, one way is Va. code § 19.2-263.3.[4]

---

[4] code § 19.2-263.3 allows a prosecutor to suspend proceedings with reasons.

Virginia's ruling here, in opposite of the Due process clause, show the State Court allowed the prosecutor to violate portions of the statute by not providing a reason for the nolle prosequi. All this was brought to the attention of the State Appellate Courts. There also is a vindictive element to the prosecutor's reason to single–out Lawrence for felony prosecution.

Fourth It is vitally important that the lower Courts apply a proper constitutional test for determining the elements in a race-based selective prosecution claim, specifically; can evidence arise from one case or multiple cases, what is similarly situated and what is unconstitutional motive.

I. The Virginia Supreme Court, in agreement w/ the Va. intermediate Appellate Court contradicts this Court's Proof of the elements in a race-base Selective prosecution claim.

A. This court's precedents require that Claimant show that similarly situated persons of different race were not

prosecuted but could have been, and how similarly situated persons are determined.

To succeed on a claim of race-based selective prosecution a claimant must show that similarly situated persons of another race should have been prosecuted but were not and was motivated by a discriminatory purpose. Armstrong, 517 U.S. 464. Both elements were met: Lawrence Mattison (petitioner) a black male was assaulted in his home by Jason Dean, a white male and Jessica Dougherty, a white female. Lawrence and Jessica, under Miranda, admitted using a weapon. Jason, under Miranda, admitted to assault. All were charged with the exact same felony charge. The prosecutor's motive was to single out Lawrence (petitioner) for a felony act against Jason and not hold Jessica accountable for assaulting Lawrence. It's clear and convincing that Jessica and Lawrence were similarly situated.

The intermediate Va. Court w/ the Va. Supreme Court avoided address of this similarly situated

element presented to them. Prior to grand jury proceedings the prosecutor had all three mirandized statement. There is no legitimate reason petitioner was singled-out, therefore the Va. Court's cannot assume the prosecutor used proper discretion. Jessica's trial court testimony is consistent with her Miranda statement. It's clear that she should have been held accountable for her acts against Lawrence.

B. Petitioner maintains that motive of a XIV Amendment violation was shown in this case.

In direct conflict with this Court the Virginia Courts applied an unconstitutional standard and arbitrarily claimed Petitioner has not affirmatively shown that his prosecution was based on unconstitutional motives. Here evidence in the record states that another of different race and gender was involved in this case and admitted to her use of a weapon. Her

admittance had no justifiable reason. Also the Va. Court was shown clear evidence that vindictiveness was, at first look, a retaliatory tactic in Petitioners prosecution. The Virginia Appellate Court gave no factual, ethical, discretionary, constitutional rule or reason why Jessica's involvement was ignored.

In 2004 Lawrence filed a complaint to the Virginia State Bar in reference to a Hampton Commonwealth Attorney. Lawrence Mattison v. Commonwealth of Virginia, Supreme Court case # 042417; Intermediate Appellate Court case # 3045-03-1.

Filing a complaint in-itself made Petitioner a target of the City's prosecutors' office. This motive along with the race-based motive was ignored by both Virginia appellate courts.

In 2005 Petitioner filed in this Court a writ of Certiorari, Lawrence Mattison v. the Supreme Court of Virginia, record # 05-626 which petitioner outlined these very specific unconstitutional tactics.

In this case on petition certain tactics were used to move this case forward. Along with the other

information presented show this was selective and vindictive prosecution. Example:

- No persons testified in the court of no record or prior to the nolle pros,
- the detective who filed the warrants did not testify before a grand jury nor did a detective who mirandized each statements nor did Jessica,
- the detective who testified before a grand jury would not have all the evidence or information the prosecutor had, therefore that detective would have provided partial/inconsistent evidence, which should have been known as partial/inconsistent by the prosecutor prior to any grand jury testimony,
- the granting Jessica "immunity" before a grand jury assembly inconsistent

with any Va. statute or rule. Other than these due process violations there is nothing in the records in this case to indicate why Jessica's involvement was ignored,

- All pictures of petitioner's injuries taken at the Veterans Hospital by the crime scene techs were never shown or put in Jessica or Jason's file,
- and because there are NO exhibits in Jason or Jessica's file of petitioner's injuries (petitioner had 3 stab wounds and facial lacerations). When Jason pled, a Judge had no pictures to look at, therefore no suspicions were raised and no inquiries would be made (petitioner was not told about the plea hearing) as to why Jason's charges were being reduced.

These tactics told to the Va. Appellate Courts should have shown them that a not-so-honest case was submitted to a grand jury omitting Jessica's involvement or giving with excuse. The intermediate Appellate Court ignored these issues.

What would draw a clearer constitutional violation IF the Va. Courts had the checks & balances would be; why petitioner was singled-out, the grand jury testimony of the police detective verses All 3 mirandized statements and what the Prosecutor already knew.

CONCLUSION

It is vitally important to the integrity of the fourteenth Amendment that the Virginia Appellate Courts speak to this race-based selective prosecution claim and determine similarly situated persons, multiple or single case evidence, the vindictive motive spoken to the Va. Courts by Petition and the grossly arbitrary tactics of the prosecutor which

have caused petitioner to suffer due process and equal protection violations. For these reasons Petitioner prays this Court would GRANT the writ of Certiorari.

Respectfully submitted,

Lawrence Mattison,
Pro se
2010 N. Mallory St. #B
Hampton, Va. 23664
(757) 604-7894
lawrence.mattison@va.gov

VIRGINIA:

In *the Court of Appeals of Virginia on* Wednesday

the 13th *day of* August, 2008.

Lawrence Mattison,
Appellant

against

Record No. 0252-08-1
Circuit Court No.
CR07-1271

Commonwealth of Virginia,
Appellee.

From the Circuit Court of the City of Hampton

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant challenges the sufficiency of the evidence to sustain his conviction for assault and battery,in violation of

Code § 18.2-57.

When considering the sufficiency of the evidence on appeal, "a reviewing court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" Crowder v. Commonwealth, 41 Va. App. 658, 663,588 S.E.2d 384, 387 (2003) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)). "Viewing the evidence in the light most favorable to the Commonwealth, as we must since it was the prevailing party in the trial court," Riner v. Commonwealth, 268 Va. 296, 330, 601 S.E.2d 555, 574 (2004), "[w]e must instead ask whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" Crowder, 41 Va. App. at 663,588 S.E.2d at 387 (quoting Kelly v. Commonwealth, 41 Va. App. 250, 257,584 S.E.2d 444, 447 (2003) *(en banc))*. See also Maxwell v. Commonwealth, 275 Va. 437, 442, Appellant was initially charged with maiming, in violation of Code § 18.2-51. The trial court found him guilty of the lesser-included offense of assault

and battery, in violation of Code § 18.2-57. 657 S.E.2d 499, 502 (2008). "This familiar standard gives full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319.

"To sustain a conviction for assault, the evidence need only prove 'an attempt or offer, with force and violence, to do some bodily hurt to another.'" Seegars v. Commonwealth, 18 Va. App. 641, 644, 445 S.E.2d 720, 722 (1994) (quoting Harper v. Commonwealth, 196 Va. 723, 733, 85 S.E.2d 249, 255 (1955)). "When the injury is actually inflicted, a battery has been committed regardless of how small the injury might be. 'Battery is the *actual infliction of corporal hurt* on another (e.g., the *least touching* of another's person), *willfully or in anger,* whether by the party's own hand, or by some means set in motion by him. '" Id. (quoting Jones v.

Commonwealth, 184 Va. 679, 682, 36 S.E.2d 571, 572 (1946)). In this case, appellant acknowledges that he stabbed and cut the victim, Jason Dean, with a utility knife. Appellant asserts, however, that "Jason's own aggressive actions is [sic] what got him cut." In other words, appellant claims he acted in self-defense.

The Virginia Supreme Court has consistently held in cases of assault and battery where the defendant claims self-defense that it is not necessary that he be actually in danger of his life or of great bodily harm, or that it so appear to the jury, but that the test is whether it reasonably appeared to the defendant at the time that his life was in danger or he was in danger of great bodily harm. Harper, 196 Va. at 729-30, 85 S.E.2d at 254. Here, the evidence demonstrates that appellant and the victim were initially involved in a struggle, which did not involve any weapons. After this initial struggle ended in a stalemate, appellant retrieved a utility knife and repeatedly stabbed and cut the victim.

Thus, the trial court properly rejected appellant's claim of self-defense, since it was unreasonable for appellant to believe "that his life was in danger or he was in danger of great bodily harm" after the initial struggle had ended. Id. Instead, appellant reinitiated a second, more violent encounter with the victim after their initial encounter had ended, and, as a result, the evidence is sufficient to sustain his conviction for assault and battery.

II. Appellant asserts that the trial court erred in failing to find the victim ' s testimony inherently incredible.

"The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138,455 S.E.2d 730, 732 (1995). "The conclusions of the fact finder on issues of witness credibility 'may

> only be disturbed on appeal if this Court finds that [the witness'] ... testimony was inherently incredible, or so contrary to human experience as to render it unworthy of belief.",n Moyer v. Commonwealth, 33 Va. App. 8,28, 531 S.E.2d 580, 590 (2000) (en banc) (quoting Robertson v. Commonwealth, 12 Va. App. 854, 858,406 S.E.2d 417, 419 (1991)).

In this case, the trial court found the testimony of the victim and the victim's girlfriend, Jessica Dougherty, credible. Neither individual's testimony was inherently incredible or so contrary to human experience as to render it unworthy of belief. The trial court simply rejected appellant's version of the events, which it was entitled to do while sitting as the trier of fact. See Black v. Commonwealth, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981) ("The fact finder need not believe the accused's explanation and may infer that he is trying to conceal his guilt.").

III. Appellant claims the trial court erred in finding him guilty of a lesser-included offense, assault and battery, in the absence of a "request or motion"; and,

IV. Appellant argues that "this [is] a case of selective prosecution in violation of [his] equal protection rights afforded under the Fourteenth Amendment to the U.S. Constitution."

Appellant concedes that he failed to present either Issue III or Issue IV to the trial court. In short, appellant admits he did not object on either of these bases. 'The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998). See Rule 5A:18.

Nevertheless, appellant urges this Court to consider these issues under the ends ofjustice exception to Rule 5A: 18. '"The ends of justice exception is narrow and is to be used sparingly,' and only when a trial

court error is 'clear, substantial and material.' Tooke v. Commonwealth, 47 Va. App. 759,764, 627 S.E.2d 533, 536 (2006) (quoting Brown v. Commonwealth, 8 Va. App. 126, 132, 380 S.E.2d 8, 11 (1989).

"In order to avail oneself of the [ends of justice] exception, a *defendant must affirmatively show* that a miscarriage of justice has occurred, not that a miscarriage might have occurred." Redman v. Commonwealth, 25 Va. App. 215, 221 , 487 S.E.2d 269, 272 (1997) (emphasis added).

Here, appellant has not affirmatively shown that a miscarriage of justice occurred, and, moreover, the record does not reflect any reason to invoke the ends ofjustice exception. Specifically, for example, as to appellant's selective prosecution argument, appellant has not affirmatively shown that the decision to prosecute him for maiming, for which there certainly existed probable cause, "was based on an unconstitutional motive." See Boyd v. County of Henrico, 41 Va. App. 1,34,581 S.E.2d 863, 879 (2003) ("To succeed on a selective-prosecution claim, a

defendant must demonstrate that the prosecutor's decision 'was based on an unconstitutional motive.", (quoting Rowsev v. Lee, 327 F.3d 335,343 (4th Cir. 2003»). Accordingly, Rule 5A: 18 bars our consideration of these issues on appeal.

> This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule A:15(a) or 5A: 15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court. This Court's records reflect that Terry N. Grinnalds, Esquire, is counsel of record for appellant in this matter.

A Copy, Teste:

Cynthia L. McCoy, Clerk
(Original signed by deputy Clerkr)

VIRGINIA:

In the Supreme Courtof Richmond held at the Supreme Court Building in the City of Richmond on Wednesday *the* 24th *day of* June, 2009.

Lawrence E. Mattison,
Appellant

against

record no. 082391
Court of Appeals No.
025208-1

Commonwealth of Virginia,
Appellee

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patrica L. Harrington, Clerk

By: origional signed by deputy clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 24th day of September, 2009 .

Lawrence E . Mattison,
Appellant
against

Record No . 082391
Court of Appeals No . 0252081

Commonwealth of Virginia,
Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 24th day of June , 2009 and grant a rehearing thereof, the prayer of the said petition is denied .

A Copy,

Teste :

Patricia L . Harrington,

Clerk

By : *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk